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No. 00-1527

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH R. EVANNS,
Petitioner,

v.

AT&T CORPORATION, et al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully submits the following reply to Respondents' Opposition to Petitioner's Petition for Writ of Certiorari because the Respondents' opposition incorrectly stated a number of substantive factual and legal matters and due to the great importance of this case to tens of millions of telephone consumers in America and to the uniform and principled administration of justice. It is notable that Respondent Pacific Bell has neither filed its own opposition to the Petitioner's Petition for Writ of Certiorari nor has it joined in the opposition jointly filed by Respondents MCI and AT&T. Pacific Bell, though not per se a long distance carrier, bills and collects the subject USF charge from its customers on behalf of Respondents MCI and AT&T and thus sub silentio has conceded the correctness of the Petition.

I.

RESPONDENTS MISCHARACTERIZE PETITIONER'S CASE AS A CHALLENGE TO A FILED RATE —WHICH IT IS NOT— AND IGNORE CONTROLLING LEGAL AUTHORITY AFFIRMING THE FCC ACTION TO ELIMINATE FILED RATES IN THE FIELD OF LONG DISTANCE TELEPHONY

Respondents attempt to minimize the importance of this case by mischaracterizing it as nothing but a mere "garden variety challenge to a filed-rate". To the contrary, this bland assertion is erroneous on all scores: it is not a "garden variety" challenge to a

filed-rate because it is not in the filed rate field (or "garden") and because the filed rate "garden" no longer exists with respect to long distance telephony.

Petitioner sought all remedies available to him which remedies include inter alia the injunctive provisions of the California Consumer Protection Laws, in order to compel the Respondent long distance telephone carriers to fully disclose to the unaware public what Respondents are doing when they tack onto the telephone bill of consumers a flat charge which does not relate to long distance telephone service and thus is not validly subsumed under the filed-rate even if it existed, comprising a passthrough to the public of the Universal Service Fee ("USF") assessed upon the carriers by the FCC and which should be borne by the telephone carriers alone, if at all.

The unsuspecting public sees a charge on the telephone bill labeled as "Federal Universal Service Fee" and has no reason to doubt that this is a proper charge. After all the telephone company is not going to demand monies that are not due them, are they?

Petitioner fully demonstrated that telephone carriers by FCC regulation are barred from billing and collecting this USF assessment from the public and that if they do so they must fully disclose the nature of the charge (i.e. the carriers' USF assessment), that the charge is not required by law to be paid by the consumer, that not all carriers pass the USF charge to their customers and that the customer is free to use a carrier that does not pass through its USF assessment, and the like.

Nor is there anything in any FCC regulation or rule which offers any support at all to Respondents' heavily relied upon proposition that the USF pass-through to the consumer is subject to, or part of a filed-rate. As Petitioner further demonstrated, the Respondents not only have violated the aforesaid FCC regulation but they have failed and refused to disclose at all what they were and are doing, i.e. that they are not to pass on this charge to their customers, that the charge is not for service but is a passthrough of the assessments levied upon the carriers by the FCC, that it is not a government fee or tax on the consumer, that some carriers are not passing through this charge to their customers, and that the customer is free to seek another long distance carrier which does not pass this charge to the customer. Petitioner then demonstrated that there are no filed tariffs any more; Respondents now say this will only be in effect this year and is not retroactive and they continue to charge and bilk the public. If they get away with it, every entity in a similar position will do likewise (if they do not already) and add to service charges all sorts of other fees and expenses totally unrelated to the actual product or service provided and blandly say, it is in the filed-rate and therefore the customer must pay it.

This Honorable Court cannot let stand Respondents' defiant anti-consumer position. This case is an attempt to compel Respondents to disclose what they are surreptitiously doing to consumers.

II.
THERE ARE NO FILED RATES ANYMORE BUT RESPONDENTS ARE STILL CHARGING AND COLLECTING. ON WHAT BASIS?

Respondents admit, as they must, that in 1996 the FCC did away with filed tariffs. Perhaps that was done because the FCC saw how such filings were abused by the Respondents. The Respondents of course disagreed with this and went to Court seeking nullification of the FCC's Detariffing Order. In 1997 the DC Court issued a stay of enforcement of the Order and the DC Circuit lifted that stay last year. Logically then, the lifting of the stay means that since 1997 (or even 1996) filed rates are of no effect. The fact that the FCC issued a transition order until January 31, 2001 and that during this transition period carriers could maintain and file tariffs if they want to, has no bearing on the case at hand because even if, arguendo only, filed tariffs were still effective to January of this year, which Petitioner denies, this is now May 2001 and the Respondents are still charging and collecting from their customers the USF fees. On what basis?

Notably, Respondents concede the correctness of the California case of Spielholtz v. Superior Court, 86 Cal. App. 4th 6 (2nd Dist. 2001), on the basis that its application of California State Law upon wireless long-distance telephony was justified because such wireless telephony is not subject to filed tariffs and the filed-rate defense. Unfortunately, however, for respondents, the filed rate for wire (as opposed to wireless) long distance telephony has been eliminated as of 1996, 1997 or (at the latest) Janu-

ary 31, 2001. Thus a fortiorari, the Respondents' concession of the correctness of Spielholtz, constitutes a concession of the correctness of Petitioner's position.

Petitioner respectfully argues that there is no valid basis upon which the Respondents have collected the charges from their customers since 1997 (or 1996).

III.
RESPONDENTS STATE THE BLACKMAN OPINION SHOULD NOT BE CITED; YET THE VERY AUTHORITY THEY ATTEMPT TO EMPLOY TO JUSTIFY THIS BASELESS POSITION CONTRADICTS THEM.

Respondents cite on p. 20 of their opposition authorities for the proposition that an unpublished opinion cannot be used except as collateral estoppel. Petitioner has shown that the very parties and their very counsel herein also appeared in the Blackman case and in view of the similarity of issues in the cases therefore the Respondents must be bound by collateral estoppel. Respondents say Blackman could have been overturned on appeal but it was not appealed to Petitioner's knowledge, nor do Respondents claim it has been appealed, nor could it have been appealed, as provided by 28 USC Sec. 1447 (d).

On the merits regarding remand, Respondents do not defend the 9th Circuit's failure to implement its open precedent which was the basis of the Blackman remand. The case of Etheridge v. Harbor House

Restaurant, 861 F. 2d 1389(9th Cir. 1988) is not even alluded to in Respondents' Opposition; yet, it is decisive in favor of the Petitioner on the issue of remand regardless of the collateral estoppel effect of the Blackman case: as stated by the 9th Circuit in Etheridge: "District courts may not take removal jurisdiction over a case within the NLRB's exclusive jurisdiction for the limited purpose of dismissing to protect the jurisdiction of the NLRB." Id. at 1405. As noted in the opening brief, district courts obviously do not exist to protect the alleged jurisdiction of the FCC.

IV.
JUDICIAL NOTICE COULD NOT HAVE BEEN TAKEN OF DOCUMENTS WHICH DID NOT EXIST. THE DECISION MUST BE CORRECTED.

The Respondents disingenuously claim that since the 9th Circuit affirmed the taking of Judicial Notice of the alleged tariff filings by Respondents, it will be a "waste of this Court's valuable time and resources" to even determine if Judicial Notice was proper. (p.22 of Respondents' opposition).
Petitioner has shown that there were no filed tariffs, contrary to what the Respondents alleged.
To say now such did exist because the 9th Circuit affirmed the decision of the district court which determined that judicial notice of these nonexistent tariffs is proper, flies in the face of all logic.
The judicial notice taken in the District Court and in the 9th Circuit was improper and must be corrected.

V.
RESPONDENTS FAILED TO ADDRESS CONSTITUTIONAL LAW ISSUES

Respondents fail to address the 9th Circuit's refusal to deal with the Constitutional issues and fail to cite at all this Court's seminal decision requiring the lower courts to entertain Constitutional issues whenever they are raised. See U.S. National Bank v. Independent Insurance Agents of America, 508 U.S. 437, 446 (1993). Respondents erroneously rely on Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996), which did not involve Constitutional issues.

Accordingly, the Respondents and the 9th Circuit and herein have failed and refused to address any of the very crucial Constitutional issues involved in this case.

These issues are too important to continue to be ignored and swept under the carpet and thus must be entertained and considered by this Court of last resort which is the guardian of the Constitution.

Petitioner respectfully submits that Respondents' determined ignoring of the Constitutional issues should be given weight as a concession of the correctness of Petitioner's position, the Respondents being in a position financially and otherwise, to make their meaningful Constitutional defenses out of an abundance of caution if for no other reason.

VI.

RESPONDENTS, CORRECTLY, DO NOT DEFEND THE 9TH CIRCUIT'S RATIONALE FOR AFFIRMING THE DENIAL OF ENTRY OF DEFAULT AGAINST RESPONDENTS, AND RELY ON FACTUALLY INCORRECT ASSERTIONS WHICH ARE IN ANY EVENT INSUFFICIENT TO JUSTIFY THE DENIAL OF DEFAULT.

The major vice of the 9th Circuit's decision/opinion on the issue of the Respondents' default in that it relies on an egregious misreading of Rule 81 (c), F.R. Civ. P. and Rule 6, F.R. Civ. P., as clearly demonstrated in Petitioner's Opening Brief herein. Respondents opt not to defend this novel and untenable reading of the Federal Rules; rather they rely on the unsupported assertion that removal was effected on August 13, 1998, not August 12. Even if this were true (it is not as shown previously and confirmed infra) it would not affect the result: under the plain meaning of Rules 6 and 81 (c), even if removal were accomplished on August 13, Respondents' response would have been late (August 18 due date for August 13 removal, August 20 filing, August 17 and 18 falling on a Monday and Tuesday, respectively).
Moreover, the removal was indeed effected on August 12. (See Exhibit 1 annexed).

Thus, Respondents not defending the 9th Circuit's untenable misreading of the Federal Rules they can be deemed not to oppose Petitioner's position on this issue and relying on a factually incorrect (and irrelevant) removal date, Respondents in effect by their own admission were in default.

VII.

RESPONDENTS' OPPOSITION DEMONSTRATES THE UNLAWFUL, ARBITRARY REFUSAL OF THE DISTRICT COURT TO GRANT LEAVE TO AMEND THE COMPLAINT AND THE ERROR OF THE 9TH CIRCUIT IN AFFIRMING, TO THE DETRIMENT OF LITIGANTS IN THE 9TH CIRCUIT VIS A VIS LITIGANTS IN OTHER CIRCUITS.

In their opposition (p.21), Respondents cite the district judge's statement "... the filed rate doctrine precludes Plaintiff's claim for monetary damages ...".

Though Petitioner vigorously disagrees with the position stated by the district judge, it is obvious that Petitioner could have amended to exclude a prayer for damages and requested other relief such as injunctive remedies (consistent with the Complaint), and declaratory relief; however, arbitrarily and in total violation of the letter and spirit of Rule 15, F.R. Civ. P., the district judge dismissed without leave to amend. The 9th Circuit's approval of this procedure unknown to the Federal Rules creates not only a conflict between the 9th Circuit and the Federal Rules but also with all other Circuits which follow Rule 15 F.R. Civ. P., to the substantial disadvantage of litigants in the 9th Circuit vis a vis those in other Circuits.

Respondents do not explicitly defend the affirmance of the district judge's dismissal of the complaint. As noted in Petitioner's opening brief, this dismissal on a rule 12 (b) (6) motion for failure to state a claim upon which relief can be granted is directly contra to this Court's seminal case of Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1958), in

that the district judge acknowledged that there was content in the complaint that would make out a valid (in her view) claim for relief and contrary to Conley v. Gibson dismissed nonetheless.

VIII.
RESPONDENTS MAKE NO VALID DEFENSE OF THE AFFIRMANCE OF THE ARBITRARY AND CAPRICIOUS IMPOSITION OF SANCTIONS ON PETITIONER'S COUNSEL

The Respondents wholly misstate Petitioner's position concerning the imposition of sanctions on Petitioner's counsel: contrary to Respondents' assertion Petitioner has at all times stated that the sanctions were an error of law (misreading of Federal Rules of Civil Procedure) and arbitrary (i.e. requiring Petitioner's counsel to read the mind of the district judge to discern a more lenient standard for default applicable to Respondents than to litigants generally "How could you think I would default AT & T even if they were a little long [late]?").
Affirmance of such arbitrary and unlawful imposition of sanctions creates a chilling effect on affected litigants in the 9th Circuit vis a vis litigants in circuits where such arbitrary actions of district judges are not affirmed.

IX.
CONCLUSION

It is respectfully submitted that certiorari should be granted on the bases stated by Petitioner and further that summary reversal and remand should be granted in view of the unappealed case of MCI v. FCC, 209 F. 3d 670 (D.C. Cir. 2000).

Respectfully submitted,

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May 23,2001

APPENDIX 1

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSEPH R. EVANNS, as an Individual And On Behalf Of All Those Similarly Situated, Plaintiff, vs. AT&T CORPORATION, a Corporation; MCI CORP., a Corporation; PACIFIC BELL INC., a Corporation and DOES I THROUGH 100, inclusive, Defendants.)	Case No.: BC 194116 NOTICE OF REMOVAL OF ACTION

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on August 12, 1998, defendant MCI COMMUNICATIONS CORPORATION (erroneously sued herein as MCI CORP.) filed a)

Notice of Removal of this action in the United States District Court for the Central District of California. A true and correct copy of the Notice of Removal is attached to this Notice as Exhibit 1.

PLEASE TAKE FURTHER NOTICE that, pursuant to 28 U.S.C. ss 1446, the filing of the Notice of Removal in federal court effects the removal of this action and the above-captioned Court should proceed no farther unless, and until, the case has been remanded.

DATED: August 12,1991 TROOP STEUBER PASICH REDDICK & TOBEY, LLP

By: /s/

David W. Steuber
Attorneys for Defendant
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(erroneously sued herein as MCI CORP.)